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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH LEE TOWNER AND
ROGERS LOUIS HICKS,

Petitioners,

vs.

VANDERBILT UNIVERSITY, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

IN A CIVIL RIGHTS SUIT BASED ON 42 U.S.C. 1981, ET SEQ., WHEREIN BLACK PLAINTIFFS CHARGED RACIALLY DISCRIMINATORY ENFORCEMENT OF A HIGHLY UNUSUAL AND EXPERIMENTAL EDUCATIONAL CONTRACT EXISTING BETWEEN A SOUTHERN PRIVATE UNIVERSITY AND ITS STUDENTS, WAS IT ERROR FOR THE COURT OF APPEALS TO IGNORE CONTROLLING AND BASIC PRINCIPLES OF CONTRACT LAW AND CONTRACT CONSTRUCTION IN AFFIRMING THE TRIAL COURT'S DECISION WHICH WAS ERRONEOURSLY RENDERED ON DISPUTED FACTS AND EXCLUDED CONSIDERATIONS OF CONTRACT LAW AND EQUITY.

II.

WHETHER A PRIVATE UNIVERSITY CAN LEGALLY CREATE A DISCIPLINARY SYSTEM BASED ON SOCALLED "AMBIGUOUS DISCIPLINARY RULES" AND POLICIES TO WHICH STUDENTS ARE LEFT TO GUESS WHAT IS PROHIBITED AND WHAT IS NOT; AND THEREAFTER CHARGE, TRY AND CONVICT

EXCLUSIVELY TWO BLACK STUDENTS ON THE BASIS OF AN ALLEGED BREACH OF THESE "AMBIGUOUS RULES" BEFORE A "HONOR COUNCIL TRIAL SYSTEM" WHICH WAS UNFAIRLY CONSTITUTED AND CAPRICIOUSLY ADMINISTERED.

III.

WHETHER A PRIVATE GRADUATE SCHOOL IS EXEMPT FROM THE OTHERWISE LEGAL OBLIGATION OF AFFORDING ITS STUDENTS WHO ARE CHARGED AND COMMITTED TO A SCHOOLHOUSE TRIAL FOR ALLEGED VIOLATIONS OF "SCHOOL RULES" THE RIGHTS OF FUNDAMENTAL FAIRNESS INHERENT AND IMPLICIT IN THE RIGHT TO CONFRONT AND CROSS EXAMINE THE ACCUSER, THE RIGHT NOT TO BE SUBJECT TO PREJUDICIAL HONOR COUNCIL JURORS, AND THE RIGHT TO COUNSEL, SIMPLY BECAUSE IT IS A PRIVATE UNIVERSITY, AS DISTINGUISHED FROM A STATE UNIVERSITY. THE COURT OF APPEALS, IN AFFIRMING THE TRIAL COURT, DECIDED THAT PRIVATE UNIVERSITIES ARE EXEMPT FROM THE OTHERWISE BASIC LEGAL OBLIGATIONS OF

FAIRNESS. PETITIONERS HEREIN DISAGREE. IF PRIVATE UNIVERSITIES ARE NOT EXEMPT FROM AFFORDING BASIC RIGHTS OF PROCEDURAL FAIRNESS TO STUDENTS CHARGED AND COMMITTED TO A "SCHOOLHOUSE TRIAL" FOR ALLEGED SCHOOLHOUSE RULES INFRACTIONS, DOES A 42 U.S.C. 1981 VIOLATION EXIST UNDER CIRCUMSTANCES WHERE WHITE STUDENTS ARE PROVIDED IMMUNITY FROM CONVICTIONS DUE TO THE MANNER IN WHICH THE EXPERIMENTAL SCHOOL IS STRUCTURED AND RUN WHILE MINIORITY STUDENTS ARE CAPRICIOUSLY CHARGED AND CONVICTED OF "INVISIBLE" RULES IN AN EXPERIMENTAL "SCHOOL OF AMBIGUITY."

IV.

WHETHER A PRIVATE UNIVERSITY CAN INTERFERE WITH BLACK STUDENTS' FINANCIAL AID OPPORTUNITY AND REFUSE TO INFORM OR PREVENT THEM FROM APPLYING FOR AVAILABLE FINANCIAL AID MONIES UNDER THE SCHOOL'S ADMINISTERED FEDERAL NATIONAL DEFENSE LOAN PRO-

GRAM AND THE VANDERBILT FEDERAL STUDENT LOAN PROGRAM.

V.

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT DECISION SUSTAINING THE MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANTS FIRST AMERICAN NATIONAL BANK, DEFENDANT HEARD, SURFACE AND DEFENDANT BOARD MEMBERS.

VI.

WHETHER THE APPEALS COURT ERRED IN AFFIRMING THE TRIAL COURT'S DECISION NOT TO ALLOW PLAINTIFF TO AMEND COMPLAINT TO ALLEGE COMMON LAW BREACH OF CONTRACT AND DIVERSITY OF CITIZENSHIP.

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Joseph L. Towner, Sr., and Rogers L. Hicks, pray that a Writ of Certiorari issue to review the Opinion and Judgement of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on November 24, 1982. (Appendix 20a).

OPINIONS BELOW

The unreported opinion of the U. S. District Court may be found in the Appendix to this Petition (24a) page

The opinion of the U. S. Sixth Circuit Court of Appeals is unreported, and appears at page 20a

The U.S.Sixth Circuit Court of Appeals' Order denying petitioners' Motion To Reconsider, etc., was not reported, and appears at page 4a.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was entered on November 24, 1982. (Appendix page 20a , infra). A Motion to Reconsider was submitted to the Court of Appeals on December 13, 1982, but was denied on January 28, 1983. (Appendix page 5a , infra). An Order granting the Petitioners an Extension of Time to file their Petition for a Writ of Certiorari was granted by the United

States Supreme Court on May 4, 1983; said extension is to expire on May 31, 1983 and is found in the Appendix at page 1a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments of the United States[1] and Title VI Civil Rights Act of 1968, 42 U.S.C. 1981, 42 U.S.C. 1982, and 42 U.S.C. 1985 are involved in this case. These constitutional and statutory provisions are set out in the appendix hereto page 45a.

STATEMENT OF THE CASE

A civil complaint on behalf of Petitioners, Joseph Lee Towner and Rogers Louis Hicks, was filed in the United States Dis-District Court for the Middle District of Tennessee on or about November 1973 alleging racial discrimination and discrimina-

[1]These constitutional amendments are cited to the court for reference purposes only, inasmuch as constitutional provisions do not apply to private affairs.

tory enforcement of an educational contract. The final defendants, who are the subject of this appeal as respondents, are: Vanderbilt University, Roberts Hayes, James Ullrich, James Davis - all of the foregoing named individuals being faculty members of Vanderbilt University Graduate School of Management; Alexander Heard and James Surface, being Executive Officers of the said defendant University; all individuals named as members of the Board of Trustees of said Vanderbilt University, hereinafter referred to collectively as defendant Board of Trustees; First American National Bank. (J.A. 1491) The jurisdiction of the District Court was invoked pursuant to 42 U.S.C. 1981, et seq. Petitioner Towner was then a citizen of Tallulah, Louisiana and Petitioner Hicks was then a citizen of Detroit, Michigan. Both Towner and Hicks have secured the status of forma paupis at the District Court and Appellant Court

levels.

Petitioners Towner and Hicks were two students who were admitted to Vanderbilt University, Nashville, Tennessee, one of the Respondents herein, in its newly design experimental graudate business program in the fall of 1971, known as the Graduate School of Management hereinafter referred to as GSM. Towner and Hicks were scheduled to graduate in May, 1973 and were the only two blacks in their graduating class composed of approximately 50 students. The respondent, Vanderbilt University, is a privately endowed, predominantly white educational institution. Respondents Vanderbilt University received substantial federal government funds, participated in numerous federal programs and enjoyed federal tax exemption.

The GSM was started in 1969, with a pilot group of approximately 15 students, two years prior to the admission of the

Petitioners herein. The Vanderbilt Graduate School of Management offered a two-year curriculum toward a Master's Degree in Management. (Davis Depo., page 8; J.A.[1] page 1305) In the last semester of the two-year period, Petitioner Towner was charged by two white faculty members in the GSM with acts that the said faculty members characterized as "cheating" or "possibly cheating" on successive occasions, almost on a monthly basis starting around January ~~1983~~ 1973 to May ~~1983~~ 1973. Said charges resulted in Petitioner Towner being "tried" before a group known as a "honor council," composed of students and faculty members of GSM, on or about six separate occasions during the five months period. Some of the aforesaid six trials were "re-trials" of the said charges. More than one charge was heard by the same members jurors of the "honor council."

Petitioner, Rogers Hicks, the only other

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[1]J.A. means reference to Joint Appendix in the Sixth Circuit U.S. Court of Appeals.

black in Towner's class, came to Towner's aid by protesting the charges, the convictions, and subsequent GSM expulsion of Towner to faculty and administrators in the larger university community, including the Defendant Chancellor and Defendant Vice Chancellor of the entire university. Shortly thereafter Hicks was charged with a honor code violation for giving assistance to Towner in a short two-week experimental computer course. The defendant school conceded at trial, however, that, pursuant to the experimental scheme of its program, students were encouraged to collaborate with one another in the computer course.

Neither Petitioner Towner or Petitioner Hicks was permitted to cross examine (nor even allowed to observe) the accusers at the honor council hearings; nor were they allowed the assistance of legal counsel under these very peculiar circumstances. Further,

Towner was subjected to double jeopardy (i.e. two retrials after being initially tried unsuccessfully); both retrials were conducted by prejudicial jurors. Some of the same honor council jurors had tried and convicted Petitioners at more than one trial.

At trial in the United States District Court, both faculty and students testifed that GSM was a highly experimental innovation in educational technique and philosophy, unlike any other graduate business school in the nation. (Davis Depo. 60-77; Tr. 358, 365; J.A. 1338-1355; 371, 378) The proof showed that within this experimental process, the GSM educational program that existed at the time Petitioners were students was beset by confusion, turmoil among faculty, vagueness in educational purpose, and ambiguity in policy and practices.

"Group collaboration" and "group power" were mechanisms designed by the school as

an "educational" and "real world" tool of survival. Accordingly, "group collaboration" and "group learning" was an indispensable adjunct to the GSM "learning philosophy." (Tr. 372-4; Davis Depo. 67; Tr. 1690; Tr. 458-9; Tr. 478-9) In order to achieve their objectives - whether in school or in the "real world" - students were taught that they should cooperate and learn in "groups." (Tr. 372-4; Tr. 479-8; See Exhibit 41) The proof showed through testimony - by both faculty and students - that in fact GSM was deliberately designed by the Administration and faculty to be ambiguous and vague in its policies, (Davis Depo. 60,66) thereby accounting for the absence of defined "rules." (Tr. 358, 383; Tr. 479-80; Tr. 458-61) In addition to the ambiguity of the school, the GSM constitution, upon which the Honor Council relied, was likewise deemed to be "ambiguous."

In addition to the foregoing, the Petitioners herein complained to the Court of Appeals that the Trial Court erred by sustaining a Motion for Summary Judgment filed by Defendant University Administrator, Board Members, and Defendant First American National Bank of Nashville, Tennessee. The Court of Appeals erroneously sustained the Trial Court's summary action. The original complaint filed by the plaintiffs, Petitioners herein, alleged that the plaintiffs had complained to the University Administrators of their discriminatory treatment after their appeal to the Dean of GSM went unheeded. The University Administrator and University Board Members failed to take corrective actions in the matters. Even through the foregoing matters clearly embraced questions of fact, the Trial Court treated the issue as a question of law and sustained the motion of the defendants.

In respect to the defendant-respondent First American National Bank, the plaintiffs alleged in their complaint, and subsequently proved at trial, that they sought to secure student loans from a loan program co-sponsored by Respondent Vanderbilt GSM and Respondent First American Bank on repeated occasions during their two year stay at the graudate school. On each attempt, they were told by the Dean of Financial Affairs at GSM that he had been instructed by the bank not to loan any more black students First American Student loan money due to the fact that a black graduate student had defaulted on this program in 1970. The trial record reflects that at a meeting between local NAACP officials and Faculty of GSM, the Dean, Defendant James Davis, again made the acknowledgement that the bank's instructions was the basis of his refusal to loan money to black students from the GSM -

First American Loan Fund. (Tr. 525; Tr. 1547; Davis Tr. 89, 90) The Trial Court entered a Motion for Summary Judgment on behalf of the bank, after the Defendant bank filed an affidavit denying such instructions and after Defendant Davis denied having received such instructions. The trial record reveals that from 1970 until 1978 - the time trial was in progress - the defendants had no record of ever lending a black student money from this fund since the alleged default of the black student who was enrolled in 1970.

The Plaintiffs- Petitioners established at trial that even though they were extended loans during their tenure at Vanderbilt totaling approximately $10,000.00 a piece for the two years, these amounts were significantly less than amounts given to white students similarly situated (Tr. 4-38, 4-39, 303, 204; 1512, 1513; Davis Tr. 118-122; Exhibit 89; J.A. 254, 255, 343, 344, 645,

646; 1425-1429; 1191) and, moreover, significantly less than what was needed to properly function in this expensive graduate school program. The Petitioners further established that they were neither informed nor allowed to make application to borrow from the School's federal student loan programs, to wit, the National Direct Student Loan Program and the Federal National Defense Student Loan Program. (Davis Depo. 19, 23, 24, 20; David Smith Depo. 15, 22, 23; J.A. 1313, 1315, 1316, 1314; 1439, 1441)

The District Court ruled in favor of the Respondent in its Memorandum Decision and Judgment dated August 10, 1978.

The decision was appealed to the United States Court of Appeals for the Sixth Circuit for review, which affirmed the District Court on November 24, 1982. The Petitioners filed a Motion for Reconsideration and an Order Denying the Motion was entered on

January 28, 1983.

REASONS FOR GRANTING THE WRIT

Settlement of these questions by this Court is plainly in the public interest, since they are likely to be present in almost every private university, honor council proceedings, including many now pending. Many other persons will be affected by these questions presented. Presently, private universities on the graduate level if they wish, may use unfairly their honor council proceedings as a discriminatory weapon against blacks and other minority students to assassinate their character and/or to deny them their right to property, i.e. a Degree. Clearly, the questions presented herein are of significant importance in administrations of justice in academic affairs, as well as the protection of Blacks and other minorities from capricious and arbitrary racial discrimination on the part

of the private university and/or agents.

Too long have Universities taken refuge behind the "Private School veil." In effect, the private university exempts itself from charges of racial discrimination against their black minority students by simply reciting the "private nature" of the contractual relationship.

In the Petitioners' Motion for Re-Consideration it was alleged that the Appeal Court ignored the idea of contract law in dealing with the legal questions necessary to correctly dispose of this lawsuit. This case, like all other contract cases, must be approached with the idea that contract law must play some part in its resolution, particularly, when the Petitioners claimed discriminatory "enforcement." The Appeal Court assumed that the case was substantially controlled by the "clear erroneous rule of appellate review." The Appeals

Court failed, however, to attach importance to contract law, in a contract case. It is respectfully submitted that the important legal step that the Trial Court failed to take in approaching this lawsuit was likewise not taken by the Distinguished Panel of the Sixth Circuit Court of Appeals. That step, simply stated, was to first construed the contract before embarking upon review of the facts. Construction of the contract which is a judicial function, would provide necessary insights into the meaning of the facts. (See Union Planters Corporation, et al vs. Joseph P. Howell, 578 S.W. 2d 87 (Tenn. Court of Appeals, 1978); Tennessee Enamel Mfg. and Company vs. Stovers, Inc., 192 F 2d 836 (6th Cir. 1952)

At oral argument, Petitioners' attorney pointed out to the Court of Appeals that the resolution of the case must begin, as a matter of law, by looking at the nature of

the contract.

Assessment of the nature of the contract will then lead the Court into the second important legal inquiry, to wit, whether there was different enforcement of the contract as to the Petitioners in comparison to white students. The latter inquiry brings the Court within the broad parameters of 42 U.S.C. 1981 et seq., which procribes discriminatory enforcement of contracts on the basis of race. Parenthetically, it can not be overlooked that there is no dispute between the parties that plaintiffs contract was enforced differently by the defendants from the manner of enforcement of white students' contracts. Respondents concede this proposition.

The Respondents simply adopt the legal position (as opposed to a factual position) that such different enforcement was justified under the circumstances, e.g. by bringing charges against the plaintiffs in the

first place and/or utilizing the schoolhouse procedures the school utlized in its unfair trial process, and/or convicting the Petitioners of alleged misconduct and/or denying the Petitioners the opportunity to seek First American Bank loan. Hence, it is self evident that "different enforcement" of the contract was employed. The Dean of the School called the school "a school of ambiguities" and "an experimental school," beset by many conflicts. What was the nature of the ambiguity? When the defendants admit that their contract was unlike any other contract in the Country; the legal instinct demands that one construe the contract - which is a legal task and not a matter of evaluating the "weight of disputed facts." When one examines the contract before the Court, one discovers some more startling and very revealing insights. Those insights brings one unerringly to racial discrimination as practiced by the Respondents herein.

Ambiguity of Rules and Policy. The repeated charges brought against the Petitioners by Respondents Vanderbilt were absolute nullities and void on their face. Said charges constituted harrassment as a matter of law, under circumstances where the school and the rules contained therein were "designed to be ambiguous and vague" and where faculty members based their charges on "unannounced rules." In case at bar, the Respondent Ullrich brought charges on unclear instructions to Towner, and Respondent Hayes brought charges on a "rule" which had never been announced or where there was in fact no infraction at all.

In the United States Supreme Court case of Ashton vs. Kentucky, 385 U.S. 195 at 200, 86 S. CT. 1407, at 1410, 16 L. Ed. 2d 469 (1966), the Supreme Court stated as follows:

> "Vague laws in any area suffer a constitution infirmity; and what the constitution demands of other laws it exacts imperatively of those who under-

> take to punish..." See also Kirkwood vs. Ellington, 298 F. Supp. 461 (W.D. Tenn. 1967) decided by a three judge panel, which included Sixth Circuit Judge Honorable Harry Phillips, and District Court Judge Honorable Bailey Brown".

Moreover, even if the learned Trial Court had sought to analyze this matter under basic contract law, enforcement of vague contractual provisions would be impermissible under the circumstances of this case. Lane vs. Grand Fraternity, 132 Tenn. 235, 177 S.W. 941; Morgan vs. Firestone Tire and Rubber Company, 68 Idaho 506, 201 P. 2d 976; 17 Am Jur 2d, Sections 275 and 276.

The school knew, even before these black students were sent through the "Vanderbilt process," that the "basic principle" of this newly developed experimental school called GSM was that all "academic code of conduct" was or would be ambiguous, ever shifting and ever changing. Respondent James Davis, Dean of GSM, described the in-

situtation as "the school of ambiguity." All witnesses who had a direct connection with GSM openly admitted that GSM was an experimental school, whereby the students were the subject and the object of that experiment.

Witness Dan Lane detailed for the Court how the school operated, its philosophy and its practices of this unique experiment.

There does not presently exist legal precedent as to how "Private Schools," particularly on the graduate school level, must procedurally conduct their affairs when subjecting their students to "schoolhouse trials" for alleged school infractions.

Whatever procedures that are adopted by private graduate schools must conform to principles of "basic fairness," as "basic fairness" has been defined by Anglo-American law for centuries, e.g., effective notice, confrontation of ones accuser, impartial fact finders, equal protection, and clarity of rules. Basic ingredients to that con-

cept known as "fairness." Indeed, concepts molded, through mankind's advancing notions of "ordered justice," to guard against any form of discrimination, including racial discrimination, when the "adversary fact finding process' is being utilized as a tool to determine truth.

The Respondent-Vanderbilt processed two black students through a "judicial proceeding" that was absent - and we might add "absent" by design - of what lawyers, writers of treatises, and Judges normally called "basic due process rights." Rights like confronting one's "accuser" and "cross-examining one's accuser." Vanderbilt would not allow an accused graduate student even the opportunity to see the accuser while testifying, not to mention would not allow cross-examination of the accuser. Other rights that were seriously impaired in the "Vanderbilt trials" were the right to an

"impartial jury" - (in the Vanderbilt trials the "jury" was known as the "honor council")- and the right to be regulated by and tried on "clear and unambiguous rules." The proof showed by an overwhelming weight of evidence- including admissions by the defendants themselves - that this latter right of rule clarity was not only impaired, but deliberately destroyed in most instances by virtue of an "experiment" of which the school was employing upon the students.) Of significant note, the defendants-appellees totally ignored the foregoing decisive issues in their brief.

When black students were processed through the foregoing "judicial process" they would get convicted, repeatedly, on whatever charge that was being brought. On those rare occasions when white students would be confronted with the "vanderbilt process" to be distinguished from "due process" - they would never get convicted, or even

charged.

In respect to the racially discriminating lending practices of GSM and/or First American National Bank, Petitioners Towner and Hicks were discriminatory restricted to a single fund during the two years of their stay at GSM; white students on the other hand, were not so restricted and were allowed to work in business or governmental agencies, both in Nashville, as well as out of the State, or Country, for pay and academic credit while a student at GSM. (Tr. 4-38, 4-39, 203, 204, 1512, 1513; Davis Tr. 118-122; Exhibit 89; J.A. 254, 255, 343, 344, 645, 646; 1425-1429; 1191). Even though Towner and Hicks were frequently in need of funds during their two years, defendant Davis never offered, referred or even mentioned to Towner or Hicks the availability of the National Student Defense Loan or Vanderbilt University Federal Student Loan Fund administered by Vanderbilt

University in the central office of the major University complex, although white students were referred and did receive these government funds through Davis. (Davis Depo. 19, 23, 24, 20; David Smith Depo. 15, 22, 23; J.A. 1313, 1314, 1315, 1316; 1439, 1440, 1441). As aforesaid, Davis restricted the Petitioners' borrowing to the Baker-McGill Fund exclusively, which he administered. Further trial testimony revealed that Respondent Davis blocked Towner from receiving additional financial supplement through employment, as well as academic credit, by preventing him from working at a prestigious national accounting firm that had actively sought his services.

The Appeal Court should not have affirmed the Trial Court's decision. To sustain a Motion for Summary Judgment before trial was totally premature. There was a genuine issue of fact to be tried and hence, Respondent Bank was not entitled to a Summary

Judgment as a matter of law. In sustaining the Respondent First American National Bank's Motion for Summary Judgment, the Trial Court erroneously engaged in resolving factual disputes in favor of the moving party, by indicating that the Trial Court believed Davis' affidavit that the Respondent Bank did not give Davis instructions to deny black students loan after the alleged default of said loan by a black student the year prior to the Petitioners' admission to GSM. The circumstantial evidence subsequently adduced at trial suggest that "believing" Davis on this point was premature. (Davis Tr. 92, 98, 99; Davis Depo. 10, 87, 88, 92; J.A. 1407, 1411, 1412; 1307, 1358, 1359, 1361)

Additionally, the Trial Court, and subsequently, the Court of Appeals, improperly resolved questions of vicarious liability in favor of the defendant bank by (1) ignoring the vicarious liability inherent in

a joint-venture relationship existing between Vanderbilt and First American National Bank; (2) ignoring the vicarious liability in an agency relationship existing between the said institutions; (3) by resolving the factual issue of agency in favor of the defendant bank without an evidentiary hearing; (4) by failing to legally acknowledge that whether in an agency relationship or an independent contractor relationship, under appropriate circumstances, vicarious liability can still attach; (5) by failing to legally acknowledge that Rule 56 of the Federal Rules of Civil Procedure would not allow a Motion for Summary Judgment under the circumstances of this case; (6) by failing to legally acknowledge that intentionally unsupervised conduct by one holding a duty to another allows vicarious liability inasmuch as the duty to obey the law is nondelegable. (Compare, Rural Education Association vs. Bush 298 S.W. 2d 761 (1957);

Palmer vs. Chamberlain, 191 F. 2d 532, (1951) United States vs Youritan Co., et al., 370 F. Supp. 643 (1973); Marr vs. Rife, 503 F. 2d 735 (1974); 3 Vanderbilt Law Review 1, (1949).

The Trial Court improperly dismissed Respondent Chancellor Heard and Vice Chancellor Surface, as well as Respondent Board of Trustee members, pursuant to their Motion for Summary Judgment, inasmuch as (1) Petitioners' pleadings stated a cause of action against the Respondents by alleging that they were put on notice regarding the discriminatory behavior being perpetrated against the Petitioners, failed to act to correct the matter; (2) said Petitioners admitted that Towner and Hicks got in touch with them in respect to these matters in their Answers; (3) the respondents failed to file affidavits in support of their Motion for Summary Judgment; (4) the Trial Court relied on legal authority which was totally inapplicable in

dismissing said Respondents. (Trial Court Memorandum Decision May 1977; J.A. 240) Compare Azar vs. Conley (CA 6 1972) 456 F. 2d 1382; Griffin vs Breckenindge, 403 U.S. 81, 29 L Ed. 2d 338.

As indicated in the case of Lowenthal, et al., vs. Vanderbilt University Graduate School of Management, et al., Memorandum Decision, Chancery Court for Davidson County, Tennessee, unreported, the Chancellor in this cause indicated that a fundamental problem with GSM was the failure of the executive officials, Respondents Heard and Surface, to intervene when students brought complaints to their attention. (See Lowenthal Decision at pages 34-37).

Finally, the Court was in error in refusing to allow Respondents the right to amend their complaint, to allege common law breach of contract and diversity of citizenship, while a Motion for Summary Judgment was pending. (See 6 Moore's Federal Prac-

tice, Sec. 56.10, page 56-170-172; Rossiter vs. Vogel, 134 F 2d 908, at 912; Sherman vs. Hallbauer, 455 F 2d 1236 (CA 5 1972); Green vs. Walsh, 21 F.R.D. 15 (D.C. Wis. 1957); 3 Moore's Federal Practice, Sec 15.15 (3), page 1025, 1026).

In conclusion, the petitioners would remind the Court of the words of the Chief Justice of the United States Supreme Court in the case of Bob Jones University vs. Internal Revenue Service dated May, 1983, when Chief Justice Burger stated as follows: "Whatever may be the rational for such private schools' policies and however sincere the rationale may be, racial discrimination in education is contrary to public policy." "The government has a fundamental, overriding interest in eradication racial discrimination in education-discrimination that prevailed with official approval for the first 165 years of this nation's history."

CONCLUSION

For the foregoing reasons, Petitioners pray that the Court would reverse the judgment of the Court of Appeals entered on or about November 24, 1982, in this cause, enter a judgment on behalf of the Petitioners or in the alternative to remand the cause to the U.S. Court of Appeals for the Sixth Circuit for further proceedings, consistent with the principles of law and theories of fact contained herein.

Respectfully submitted,

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v.

VANDERBILT UNIVERSITY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner(s), IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 31, 1983.

/s/ Sandra D. O-Connor
Associate Justice of
the Supreme Court of
the United States

Dated this 3rd
day of May, 1983

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C. 20543

May 4, 1983

Mr. Joseph L. Towner
9145 Lera Jones
Antioch, Tennessee

Mr. Roger Hicks
1291 Fontaine Avenue, S.W.
Atlanta, Georgia 30311

RE: Joseph Lee Towner, et al. v. Vanderbilt University, et al.
A-890

Dear Gentlemen:

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on May 3, 1983, signed an order extending your time to and including May 31, 1983.

A copy of the Justice's order is enclosed.

Very truly yours,

ALEXANDER L. STEVAS,
Clerk

By

Katherine Downs
Assistant Clerk

Mr. Joseph L. Towner
Mr. Roger Hicks

gtb
Encl.
cc(letter only): William N. Ozier, Esq.
Wilson Sims, Esq.
J.O. Bass, Esq.

John P. Hehman, Esq.,
Clerk, U. S. Court of
Appeals for the Sixth
Circuit (your No. 79-1015)

No. 79-1015

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH LEE TOWNER, et al. Plaintiffs-Appellants	)	
vs.	)	O R D E R
VANDERBILT UNIVERSITY, et al. Defendants-Appellees	)	

Before: KEITH and CONTIE, Circuit Judges; and VANPELT, Senior District Judge.*

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

Clerk

* The Honorable Robert VanPelt, Senior District Judge for the District of Nebraska, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH LEE TOWNER and ROGERS LOUIS HICKS, Plaintiffs-Appellants,	)
VS.	)NO. 79-1015
VANDERBILT UNIVERSITY, et al, Defendants-Appellees	)

BRIEF IN SUPPORT OF MOTION TO RECONSIDER, ETC.

A. Did the Plaintiffs Really "Cheat"?

The foregoing question goes to the heart of the matter, one would assume. And yet, ironically enough, resolution of this important question, while giving a spiritual impetus for deciding in favor of or against the plaintiff, does not pose the precise threshold legal question necessary to correctly dispose of this lawsuit. It is very respectfully submitted that this case, like all other contract cases, must be approached with the idea that contract law must play some part in its resolution, particularly when the plaintiffs' claimed discriminatory

"enforcement" of the contract they entered into with the defendant Vanderbilt. Implicit in the Court's Appellate Decision, as well as in the Court's line of questions to counsel during oral argument, was the assumption that this case was a case resolvable in the main, by the facts. Hence, the Court assumed that this case was substantially controlled by the "Clearly Erroneous" Rule of Appellate Review. It is respectfully urged, however, that if the Court fails to attach importance to contract law, in a contract case, then the judicial process is not well served. It is respectfully submitted that the important legal step that the trial Court failed to take in approaching this lawsuit, was also not taken by this distinguished panel of the Sixth Circuit Court of Appeals. That step, simply stated, is to first construe the contract before embarking upon a review of the facts. Construction of the contract - which is a judicial func-

tion - would provide necessary insights into the meaning of the facts. See Union Planters Corporation, et al vs. Joseph P. Harwell, 578 S. W. 2d 87 (Tenn. Ct. of Appeals, 1978); Tennessee Enamel Mfg., Co. vs. Stoves, Inc., 192 F. 2d 863 (6th Cir. 1952)

At oral argument, plaintiffs' pointed out to this distinguished panel that resolution of the case must begin, as a matter of law, by looking at the nature of the contract. Assessment of the nature of the contract will then lead the court into the second important legal inquiry, to wit: whether there was "different" (as oppose to racially discriminatory) enforcement of the contract as to the plaintiffs in comparison to white students. This latter inquiry brings the Court within the broad parameters of 42 U.S.C. 1981, et seq., which proscribes discriminatory enforcement of contracts on the basis of race. Parenthetically, it can not

be overlooked that there is no dispute between the parties that plaintiffs contracts were enforced differently by the defendants from the manner of enforcement of white students' contracts. Defendants concede this proposition. The defendants simply adopt the legal position (as oppose to a factual position) that such different enforcement was justified under the circumstances, e.g., by bringing charges against the plaintiffs in the first place, and/or utilizing the schoolhouse procedures the school utilized in its trial process, and/or convicting the plaintiffs of alleged misconduct, and/or denying the plaintiffs the opportunity to seek the First American loan. Hence, it is self-evident that "different enforcement" of the contract was employed. Legal justification, therefore, becomes the real issue. Accordingly, it is crucial to first construe the nature of the contract in order to (1) properly assess the facts and their meaning,

and (2) legally assess the legal justification of the defendants' action. If the defendants' legal justification can not be legally sustained, pursuant to the nature of the contract, then the question of race arises, under the teachings of McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1917, 36 L. Ed 2d 668 (1973).

It must have been obvious to this Distinguished Panel, in its review of the case, as it was admitted by the defendants repeatedly, and acknowledged by the Trial Court in its Memorandum, that this particular educational contract was a highly unusual educational contract. Precisely how unusual was the contract and the nature of its unusualness is a function of proper judicial "contract construction" and not a matter of resolving factual disputes. Again, one is irresistibly drawn back into a careful examination of the nature of the contract. When

the Dean of the defendant school called the school "a school of ambiguity" and described the school as an "experimental school", beset by many ambiguities, ones natural curiosity cries out: What was the nature of this admittedly, very unusual contract and what is a "school of ambiguity"? When the defendants admit that their contract was unlike any other contract in the country, the legal instinct demands that one construe the contract - which is a legal job and not a matter of evaluating the "weight of the disputed facts".

When one embarks upon the examination of the nature of this contract before the Court, one discovers some very startling and very revealing insights. Those insights lead one unerringly to racial discrimination. The first thing one discovers is that an "experimental school" is a very special brand of educational beliefs and philosophy developed

over the years in the "laboratories" of foreign educational institutions - notably Europe. Hence, an experimental school is not simply a school that experiments, but an institution that adheres to certain precise principles and values, which are alien and in contradiction to beliefs and values to which the lay public, including members of the legal profession - both lawyers and judges - are normally accustomed. Hence, one must be careful in using the word "cheating", for example, before one at least examines whether the term "cheating" has a convoluted meaning under the values of an "experimental" education - such is in fact the case. (See Appellants' Reply Brief, footnote 2)

Because this experimental school philosophy is so alient to the lay public's normal expectation and understanding of education, plaintiffs have encountered, somewhat understandably, significant resistence in getting

the Court to simply review - not accept, but just review - the substance of this philosophy. The Trial recordis over-flowing with unrebutted and unchallenged proof in respect to this philosophy as practiced by defendant Vanderbilt.

However, the Trial Court, and presumably this Court, went straight to the actions of the plaintiffs, and hence to the "factual" questions of "cheating", without first examining the laboratory test tube which contained and controlled those actions. The crucible within which these actions took place is the "nature of the contract". As a matter of fundamental obligation, the Court is obliged to look first to the nature of the contract, then construe it, before graffling with the facts. See O'Connor vs West Sacramento, 207 P. 527, 1989 Cal 7.

Because of the foregoing mentioned resistance, plaintiffs-appellants respectfully

asked this Distinguished Panel in footnote 2 contained in Appellants' Reply Brief, to examine for itself, merely as a point of reference, the mere fact that there does exist an alien form of educational philosophy known as "the experimental school", which was adopted from European educational experiences. To examine for itself, again, as a point of reference, for purposes of perceiving the differences and the nature of standard educational contracts (of which the Court is familiar) and alien "experimental contract" (of which the Court would not necessarily be familiar), in order to decipher the contrasting and contradicting philosophical perspectives of both. Once the Court becomes educated to the very existence of this alien strain of contract, all of the pieces of this case will fall into place. The case will fall into place simply by looking at the record, and only the record, with new understanding.

Hence, the question "did the plaintiffs really cheat?" will not be as traumatizing to the Court's sense of justice. (It is understandable to the plaintiffs that if the court believes that plaintiffs really "cheated," the court will have little sympathy for the plaintiffs claim in respect to "trial due process.") The plaintiffs, nor their counsel, wish for the Court to condone "cheating." The plaintiffs, nor their Counsel, wish to "hide behind" civil rights law to justify "cheating." The plaintiffs, nor their counsel, do not assert, nor do they wish for the Court to adopt a proposition that when a school fails to "catch" white students "cheating", but "catches" black students "cheating", this is an actual "civil rights" violation. Such a proposition would be a disservice to the entire civil rights movement and its great legacy. (Judge Conti in his question to plaintiffs' counsel during oral argument implicity

assumed that plaintiffs' counsel was making such a contention.)

Plaintiffs respectfully submit that once the Court examines the nature of the contract before the Court, properly construe it with new understanding, the Court will agree with the plaintiffs-appellants that, as a matter of law, there was no reasonable justification to convict them of "cheating." The Court will review with new understanding why witness Lowenthal, a white student, at page ___ of the Joint Appendix admitted that he helped a student-teacher named Berger pass the computer final and considered this action consistent with the "honor code." The Court will agree with witness Dan Lane that when he allowed a student to copy from his computer final, such actions were consistent with the philosophy of the school. (See J.A.) The Court will appreciate witness Professor Lou Millers' testimony that he repeatedly saw students aiding one

another on the computer final during the entire time that Hicks and Towner were students, without a word ever being spoken by anyone that such aid was in violation of any rules of the school. The Court will understand why plaintiff Hicks admitted that Towner gave him substantial help on the computer final and why this was acceptable conduct under the philosophy of the school. (J.A.) The reason why the Court will find all of the foregoing completely understandable will be due to the Court's re-examination of the nature of the contract, as that contract was designed by the defendants pursuant to the "experimental" philosophy of education. In a word, that alien philosophy adopts the position that students helping students, even to the point of copying, is educationally enriching to the student. (See Witness Dan Lane's testimony; see Appellants' Reply Brief, footnote 2).

Once the Court rids itself of the stigma-

tizing notion of "cheating", it is respectfully submitted that the Court will not adopt the very dangerous position that a private school can utilize any "schoolhouse" trial procedure that it wishes, no matter how contractually unconscionable those procedures may be, with impunity and without the intervention of a Court of equity. Such a dangerous position, leaves a gapping window for undisturbed racial discrimination and an unblocked conduit for racial mistreatment in private schools.

Legal resolution of the case reveals, after re-examining the nature of the contract existing at Vanderbilt, that the legal term "cheating" was, at best, vague and ambiguous, and at worst, totally inappropriate in the context of this school. This the defendants knew; and by their acknowledgement that the school was by nature ambiguous, they were charged with certain legal obligations - either explicit instructions or forebearance

in castigating students. The defendants honored them in respect to white students. Under the enforcement of their contract, plaintiffs were entitled to the same immunities as their white colleagues. The defendants singled out these two black students to castigate, with the foreknowledge that such actions were in violations of the very essence of the school's philosophy. It is respectfully submitted, that this is intentional racial discrimination.

For the foregoing reasons as well as reasons cited in plaintiffs original brief, the plaintiffs-appellants respectfully pray that the Court reconsider its decision of November 24, 1982 and/or refer the cause to the Court sitting en banc.

Respectfully submitted,

Russell B. Ennix
Attorney for Appellants
330 Charlotte Avenue

Suite 427
Nashville, Tennessee 37201
(615) 259-4330

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing Appellants' Brief In Support of Motion To Reconsider, Etc. were mailed to William N. Ozier, Esquire, J. O. Bass, Sr., Esquire, and Wilson Sims, Esquire, all of the law firm of Bass, Berry and Sims, First American Center, Nashville, Tennessee 37238, by dropping same in the U. S. Mail, postage prepaid, this 13th day of December, 1982.

_____

No. 79-1015

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH LEE TOWNER, et al.	)	
	)	
Plaintiffs-Appellants	)	
	)	
vs.	)	ORDER
	)	
VANDERBILT UNIVERSITY, et al.	)	
	)	
Defendants-Appellees	)	

Before: KEITH and CONTIE, Circuit Judges; and VAN PELT, District Judge.*

The plaintiffs Towner and Hicks, black students in the Graduate School of Management of Vanderbilt University in the early 1970's, brought this civil rights action against the University, University officials, and the First American National Bank of Nashville. Senior Circuit Judge Bailey Brown (then a chief district judge) conducted

* The Honorable Robert Van Pelt, Senior Judge of the District of Nebraska, sitting by designation.

a lengthy trial in October 1977 and April 1978 and found in favor of the defendants. The plaintiffs now appeal.

The plaintiffs' first claim is that they were denied due process in connection with proceedings initiated to determine if they had cheated on examinations and homework. The district court found that the due process claim was fatally deficient because the element of state action was not established. On appeal, the plaintiffs do not contest the district court's finding of no state action. Rather, they contend that due process principles should be extended to cover the actions of private parties in certain cases. We disagree. It is clear that due process does not protect against purely private actions. Newsom v. Vanderbilt University, 653 F. 2d 1100 (6th Cir. 1981).

The heart of the plaintiffs' case is that they were discriminated against because of

their race. 42 U.S.C. §1981 has been held to apply to actions of private schools. Runyon v. McCrary, 427 U. S. 160 (1976). To prevail, the plaintiffs first had to prove that they were treated differently than similarly situated white students.

With regard to each claim, the district court found by a preponderance of the evidence that the plaintiffs had not been treated differently than similarly situated white students. The only issue before the court as to the discrimination claims is whether the district court's finding of no disparate treatment was clearly erroneous.

Findings of fact are only clearly erroneous if the court is left with the definite and firm conviction that a mistake has been made. United States v. Jabara, 644 F.2d 574 (6th Cir. 1981). The "clearly erroneous" rule "recognizes and rests upon the unique opportunity afforded the trial

court judge to evaluate the credibility of witnesses and to weigh the evidence." Inwood Laboratories, Inc., v. Ives Laboratories, Inc., _____ U. S. _____, 102 S. Ct. 2182 (1982). We find that the district court's findings were not clearly erroneous.

We find no merit in the plaintiffs' claim that the district court erred in dismissing certain defendants prior to trial. We also find that the district court did not abuse its discretion in denying plaintiffs' motion to amend their complaint inasmuch as the motion to amend was filed over three years after this litigation was commenced.

For the reasons stated above and those set forth in Senior Circuit Judge Bailey Brown's thorough and well-reasoned opinion, the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

s/ John P. Hehman
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOSEPH LEE TOWNER and ROGERS LOUIS HICKS, Plaintiffs,	)	
-vs-	)	CIVIL ACTION NO. 7242
VANDERBILT UNIVERSITY, ET AL., Defendants.	)	

MEMORANDUM DECISION

This action was brought by Joseph Lee Towner and Rogers Louis Hicks against numerous defendants, to redress alleged racial discrimination encountered during their attendance at the Graduate School of Management (GSM or School) operated by defendant Vanderbilt Univerrsity. In our order of May 25, 1977, we granted summary judgment in favor of all defendants except Vanderbilt University, James Davis, Robert Ullrich, and Robert Hayes. At the same time we held that, although Vanderbilt is a private institution, plaintiffs had stated a claim against it and the three named individuals under 42

U.S.C. §1981 as interpreted by the Supreme Court in Runyon v. McCrary, 427 U.S. 160 (1976). At the request of Plaintiffs' counsel, we also dismissed the class action claims asserted in the complaint.

We have now held a lengthy trial on the remaining merits. This opinion constitutes the court's findings of fact and conclusions of law.

At the outset, we should take note of the various theories advanced by counsel for the plaintiffs in support of this action. It has been contended that Towner and Hicks, as black persons who had suffered economic disadvantage or other disadvantage prior to their dealings with Vanderbilt, were specially recruited by the School as part of an "affirmative action" program. Having been so selected, it is argued the School had an especially great duty to insure that these two students were successful in their

academic endeavors, and the School simply failed to meet this obligation.

On the other hand, it has been contended that Towner and Hicks were qualified, competent students, and that they were selected on the basis of their race for disparate treatment, including lower grades for equivalent work, the imposition of extra work, the denial of access to certain educational loan programs, and so forth.

As an alternative contention as to intentional racial discrimination, it has been contended that because of confusion and ambiguity in GSM's educational requirements and standards, there was no way to distinguish plaintiffs' performance from that of other students. Therefore, if plaintiffs were treated differently than other students, such differential treatment must have been racially motivated.

The court believes there is no merit in the contention that Hicks and Towner were

entitled to special treatment, or that the School somehow became an insuror of their educational success, simply because they were black or because they came from underprivileged backgrounds. We have accordingly addressed only the question whether plaintiffs suffered differential treatment on the basis of race.[1]

---

[1]Vague reference has also been made during the course of these proceedings to due process concepts. There is absolutely no showing that any of the acts complained of constitute state action, which would bring the due process guarantees of the fourteenth amendment into play. To the contrary, defendant Vanderbilt University is a private, non-profit institution, and the remaining defendants are private individuals who at all material times were employees of Vanderbilt. In any event, plaintiffs are not here seeking to have this court order additional hearings at Vanderbilt. They seek money damages and an order requiring the defendants to award them degrees.

GSM is a relatively recent addition to Vanderbilt University. It began operating in 1969 and the first full class of students entered in the fall of 1970. GSM did actively encourage the enrollment of students with diverse racial and ethnic backgrounds, and apparently gave special consideration to black applicants. All blacks who applied for admission to the School's masters program in 1969, 1970 and 1971 were admitted. Plaintiffs Towner and Hicks were the only black applicants for the class entering GSM in the fall of 1971 and they, of course, were admitted.

Both Hicks and Towner had obtained loans for the purpose of financing their undergraduate educations and were therefore in debt at the time they applied to GSM. They and their families were unable to pay tuition and living expenses incidental to their attendance at GSM.

Arrangements were therefore made, primarily through the defendant Davis, for financial assistance. For the 1971-72 school year, Hicks received a full tuition grant (worth $) and a $2500 loan from Vanderbilt's Baker loan program. The same year, Towner received a full tuition grant, and a $1500 Baker loan.

For the 1972-73 academic year, Hicks received a $2800 tuition grant, a $3800 Baker loan, and a $250 emergency loan. Towner received a $2800 tuition grant, a $2200 Baker loan, and a $250 emergency loan, as well as the offer of a part-time job as a dormitory supervisor.

For the two years combined, Hicks received a total of $11,850 in grants and loans, and Towner received a total of $9250 in grants and loans. These amounts exceed the amount of financial assistance offered to any other student in GSM's history.

Plaintiffs complain that Davis excluded them from consideration for loans available under a cooperative program set up by Vanderbilt and the First American National Bank. However, the proof shows that the Baker loans actually made to plaintiffs were on terms much more favorable to plaintiffs than The First American loans.[2] Additionally, Davis had to consider the fact that Towner and Hicks might not have been approved for loans by First American, since with their existing indebtedness from college loans they were not good credit risks. It is the opinion of the court that Davis simply offered both plaintiffs the

---

[2]The First American loans carried a higher interest rate than the Baker loans; interest had to be paid on the First American loans while the student was in school, while the Baker loans were interest-free during the student's enrollment; and the First American loans had to be repaid more quickly following graduation than the Baker loans.

best financial packages available, without regard to any racial considerations.

Towner and Hicks also claim they were the object of discrimination in grading, assignment of work, and other academic matters. This situation is complicated by the fact that GSM, at the time of plaintiffs' attendance, was experimenting with an innovative approach to graduate education which was loosely structured and provided fewer concrete guidelines for student performance than traditional educational programs. However, the School did not operate, as Towner and Hicks assert, with a complete lack of academic standards.

Grading at GSM, at all material times, was on the following basis:

"Pass" or "Complete"	- Satisfactory completion of course work
"Incomplete"	- failure to complete course requirements
"Repeat"	- performance insufficient

During their initial year at GSM, Hicks and Towner obtained a grade of incomplete in an inordinate number of courses. Hicks finished the year with ten incompletes, more than any other student. Towner had eight incompletes; this gave him, along with two white students, the second highest number of incompletes.

The second year of study at GSM involved, inter alia, completion of an independent study program. Hicks and ten white students with a large number of incompletes were informed by the faculty at the end of the first year that they would not be eligible for independent study credit until they had reduced the number of incompletes to three. Hicks was advised that, because of his ten incompletes, he would not be readmitted to the School for the second year of studies.

Subsequently, after Hicks advised the

defendant, Ullrich of certain personal problems which allegedly were responsible for his poor performance in the first year, the faculty voted to readmit Hicks despite his record. This was done partially in response to statements made in behalf of Hicks by Ullrich at a faculty meeting.

The Court finds no credible evidence in support of the view that Hicks and Towner received the incompletes because they are black. Rather, they received these grades because they did not complete the work required for the various courses.

Neither Hicks nor Towner was able to begin work on an independent study program until late 1972 or early 1973, since they spent the fall completing various aspects of their first year work. When Towner did develop an independent study plan, he proposed a forty hour per week internship with an accounting firm, Ernst & Ernst. The defendant Davis was a member of Towner's

independent study committee, and vigorously opposed the approval of Towner's proposal. Towner's proposal was in fact, rejected by the committee.

However, it appears to the court that this rejection was based on the committee's belief that Towner could not benefit educationally from the Ernst & Ernst experience, and would not be a credit to the school. This belief was supported by Towner's failure to pass the basic GSM accounting course in three attempts, even though he had majored in accounting while in college. Additionally, the committee had doubts that Towner could keep up with his other academic pursuits along with a regular forty hour work week. The rejection of Towner's proposal to work with Ernst & Ernst cannot reasonably be viewed as grounded in racial considerations, especially in light of the fact that a black GSM student had previously been

permitted to work for Ernst & Ernst in fulfillment of the independent study requirement.

Towner and Hicks have alleged certain other instances in which they feel they were singled out for differential treatment because they were black. These include the questioning of Towner by Professor Tivis Nelson, in a class on "group behavior", as to the subjective experience of one who becomes the object of discrimination; and the resignation of Hicks from the admissions committee because of his poor academic performance and the time committments required of committee members. It is sufficient to note that the court finds by the preponderance of the evidence that these incidents were not racially motivated. To the contrary, the evidence supports the view that both Towner and Hicks received fair and considerate treatment at all times from the

faculty and administration.

Additionally, plaintiffs claim that they were subjected to repeated charges of honor code violations, all involving alleged cheating by one or both of them, with or without the complicity of other students. It is their contention that these charges were groundless, and that they were brought as part of a racially motivated campaign to harass plaintiffs and to force their resignation or removal from GSM.

In each case, Towner and Hicks were "tried" by a panel composed of students and faculty members. As noted before, it is the opinion of the Court that constitutional standards of "due process" are not applicable to the actions of defendants herein. Therefore, our inquiry has been limited to a determination whether Towner and Hicks were subjected to unusual or differential treatment because they were black.

Towner was initially charged with cheating in a Quantitative Methods III course, and was convicted by the honor panel. A white codefendant, John Gade, was acquitted of similar charges. The court finds that the initial decision to bring charges against Towner and Gade was based on a reasonable suspicion that cheating had occurred, and that Towner's conviction and Gade's acquittal resulted from a reasonable appraisal of the facts presented to the panel and not from racial bias. Subsequently, the honor panel reopened the case on its own motion, and Towner was acquitted.

Towner was subsequently charged with cheating in another course, Advanced Motivation Theory, based on the instructor's reasonable suspicion that the handwriting on papers submitted by Towner was not his own. He was convicted on this charge also. The conviction was reversed by an appellate

panel on procedural grounds, and eventually the charges were dropped because of the School's inability to reconstitute a trial panel within the time allotted under the honor constitution. It appears to the court that defendants not only did not discriminate against Towner in these proceedings, but went out of their way to insure that he was given the benefit of all procedural protections which would be afforded any other student.

During the same period of time, both Hicks and Towner were charged with honor violations in a Computers course. Hicks was charged with and convicted of cheating, and in a separate trial, Towner was convicted of assisting Hicks in his efforts to cheat. Towner was later charged with the separate offense of cheating on his own work in the course. This last charge was apparently not followed up, since the stu-

dents and faculty were on summer vacation and a trial panel could not be constituted. Again, the court finds that these charges were brought on the basis of a reasonable suspicion that cheating had occurred, and we find no evidence that either the charges or the convictions were racially motivated. The convictions of both Towner and Hicks were appealed, but the appellate panel apparently has stayed any action on the appeals at the request of their counsel.

It should be noted that at the conclusion of all these proceedings, which occurred in the spring of 1973, Towner and Hicks had not been expelled or suspended from GSM. In June, 1973, Hicks was advised of the following uncompleted work necessary to obtain his master's degree:

1) pass the computer examination;

2) submit an acceptable paper in Small Business Management;

3) correct and rewrite an acceptable research paper concerning a local black banking institution in a shopping center feasibility study which had previously been submitted; and

4) pass the elective courses in Law and the Poor and Investment Analysis.

At the same time, Towner was advised of the following work necessary to obtain his degree.

1) pass the Operations Management-Production course;

2) pass the Computers course;

3) pass a re-examination in Managerial Finance;

4) submit an acceptable paper in Advanced Motivation Theory; and

5) correct two previously submitted papers and submit an acceptable research paper.

Neither Towner nor Hicks has attempted to complete these degree requirements.

On the evidence presented, the court finds that plaintiffs were not subjected to ill-treatment at GSM on the basis of

race, and were not denied the opportunity to make or to enforce contracts on that basis. To the contrary, we believe that defendants made substantial efforts to give plaintiffs special assistance, financially and academically, because they are members of a racial minority group and because of their financially underprivileged backgrounds. In light of these efforts, it is highly unlikely that the defendants subsequently entered a conspiracy to discriminate against Towner and Hicks, which is essentially what the plaintiffs contend occurred.

For all the foregoing reasons, the remaining defendants herein, Vanderbilt, Hayes, Davis and Ullrich are entitled to judgment in the premises.

The Clerk is directed to enter such judgment, with costs to be taxed to the plaintiffs.

It is so ORDERED.

Enter this 9th day of August, 1978.

s/ Bailey Brown
CHIEF JUDGE BAILEY BROWN

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

JOSEPH LEE TOWNER and ROGERS LOUIS HICKS,	)	
Plaintiffs,	)	
V.	)	CIVIL ACTION NO. 7242
VANDERBILT UNIVERSITY, ET AL.,	)	
Defendants	)	

JUDGMENT

This action came on for trial on October 31, November 1, 2, 3, and 4, 1977, and April 10, 11, and 12, 1978, before the Court, the Honorable Bailey Brown, Chief Judge of the United States District Court for the Western District of Tennessee, presiding and sitting by designation, and a decision having been duly rendred by Judge Brown in a Memorandum Decision received for entry on August 10, 1978;

It is ORDERED and ADJUDGED that the

plaintiffs, Joseph Lee Towner and Rogers Louis Hicks, take nothing; that the action against the remaining defendants, Vanderbilt University, James Davis, Robert Ullrich, and Robert Hayes, be dismissed on the merits; and that the said defendant herein recover of the plaintiffs, Joseph Lee Towner and Rogers Louis Hicks, their costs of action.

Dated at Nashville, Tennessee, this 10th day of August, 1978.

s/ Frank E. Williams
FRANK E. WILLIAMS, CLERK
United States District
Court Middle District of
Tennessee

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

CONSTITUTION OF THE UNITED STATES:

"Fifth Amendment

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

"Sixth Amendment

In all criminal prosections the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

"Fourteenth Amendment

All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall an State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its juisdiction the equal protection of the laws."

STATUTORY PROVISIONS:

"42 U.S.C. 1981

§1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the securit of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties. taxes, licenses, and exactions of every kind, and to no other."

"42 U.S.C. 1982

§1981. Property rights of citizens

All citizens of the United States shall have the same right in every state and Territory, as is enjoyed by white citizens thereof to inherit, purchase,

lease, sell, hold, and convey real and personal property.

"42 U.S.C. 1985

§1985. Conspiracy to interfere with civil rights--Preventing officer from performing duties

(1)****

(2)****

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;.....in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

"42 U.S.C. §2000d

§136 Generally

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."